In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-247

MANATEE CABLEVISION CORPORATION,
Petitioner,

vs.

FLORIDA POWER & LIGHT COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT FLORIDA POWER & LIGHT COMPANY IN OPPOSITION

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TABLE OF CONTENTS

Table of Authorities

CASES

CONSTITUTIONAL PROVISION AND STATUTES

OTHER AUTHORITIES

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OPINIONS BELOW

The opinions below are set forth correctly in the Petition at p. 1. Both opinions are reproduced in the appendix attached to the Petition.

JURISDICTION

The jurisdiction of this Court in this case is accurately stated in the Petition at p. 2.

QUESTIONS PRESENTED

1. Whether the granting of a directed verdict in this case deprived petitioner of its right to a jury trial guaranteed by the Seventh Amendment.

2. Whether the District Court and Fifth Circuit were correct in ruling that in the light of the evidence as a whole, and drawing all reasonable inferences therefrom most favorable to petitioner, there was a complete lack of probative evidence to support the jury's answers to the special interrogatories.

CONSTITUTIONAL PROVISION INVOLVED

The Seventh Amendment to the United States Constitution is accurately stated in the petition at p. 2. As set forth in the argument portion of this brief, respondent contends that there is no constitutional issue involved in this case.

STATEMENT OF THE CASE

Petitioner brought suit in the district court under Sections 1 and 2 of the Sherman Act (Title 15, United States Code, Sections 1 and 2) against respondent and General Telephone & Electronics Corporation (GT&E) and two of its subsidiaries, General Telephone Company of Florida (GTF) and GTEC Communications Corp. (GTEC). Petitioner settled with all defendants except respondent, and proceeded to trial on the claim that respondent conspired with the settling defendants to exclude petitioner from competing with GTEC in the cablevision business in the unincorporated areas of Manatee County, Florida.

FACTUAL BACKGROUND
EVENTS OF 1965-68

In 1965, petitioner procured a purportedly exclusive ten-year franchise from the Board of County Commissioners of Manatee County, Florida, to furnish cablevision service in the unincorporated areas of Manatee County.

In order to distribute the TV signal from its tower to customers' homes, the CATV company could string its coaxial cables overhead on its own poles or lay them underground in public rights-of-way. By pole attachment agreement with a utility (*e.g.*, telephone or power company), the CATV operator could also attach its cables to utility poles.[1]

Respondent owned approximately 75% of the utility poles in Manatee County, and the remainder were owned by the local telephone company, GTF. In order to avoid duplication, both utilities executed a joint use agreement in 1961, which provided mutual access to their respective poles.

Prior to 1966, petitioner sought respondent's approval for the attachment of its cables to respondent's utility poles.[2] Respondent was reluctant to enter into pole attachment agreements because of safety and maintenance problems, but quite often it did so if there were a local need for CATV service and if the CATV company requesting the agreement were financially responsible. Shortly after peti-

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1. The cost of the three alternatives was essentially the same in the long run, because although the use of utility poles avoided an initial capital expenditure by the CATV company for its own poles or an underground system, use of utility poles required the continual payment of pole rentals.

2. The execution of a pole attachment agreement gave a CATV company general attachment rights to the geographic area covered by the agreement.

tioner first sought an agreement, respondent placed a freeze on the execution of all agreements, pending formalization of a CATV pole attachment policy. Subsequently, a "first-come-first-served" policy was adopted by respondent, which specified conditions under which it would allow pole attachments.

Throughout 1966 and 1967, petitioner was unable to meet respondent's conditions for the obtaining of a pole attachment agreement, particularly because it could not obtain the required resolution from the Manatee County Commission. In addition, petitioner suffered from financial instability, and went through a succession of owners.

In February 1968, petitioner finally obtained the required resolution from the Manatee County Commission. However, the Commission, in reissuing petitioner's CATV franchise, continued its exclusive right only until July 15, 1968, after which time the franchise became non-exclusive.

Since petitioner now met respondent's requirement for a pole attachment agreement, on February 21, 1968, respondent executed a form agreement, which gave petitioner attachment rights to the entire county, including the residential area known as Bayshore Gardens. Petitioner commenced construction of its underground system in certain portions of the county (including Bayshore Gardens). For whatever reason, petitioner never picked up the executed pole attachment agreement, which expired in accordance with its own terms.

Since petitioner's county franchise was now non-exclusive, another CATV company, Sarasota Cablevision, also obtained a franchise to the same area. When Sarasota Cablevision also sought a pole attachment agreement, respondent advised its owner that it would not enter into an agreement with either CATV company until they mutually agreed as to the areas to be served by their firms.

Sarasota Cablevision thereupon began operations as an overhead company. It obtained contracts with two private trailer parks, and commenced installation of its own poles and CATV cable on the public easement in the front of a number of homes in Bayshore Gardens. A public outcry resulted. Because of public pressure and the safety hazard, respondent gave Sarasota Cablevision oral permission for a trunk line through Bayshore Gardens to the trailer parks.

EVENTS OF 1969

In January 1969, GTEC purchased Sarasota Cablevision's operations. At this point, petitioner was essentially out of business, and Spencer Kennedy Laboratories (SKL), its major creditor, was attempting to arrange for a sale of the company. In February, respondent changed division managers, and the new manager was advised that petitioner was out of business.

In late January 1969, GTEC commenced an exchange of correspondence and meetings with respondent which culminated in the granting to GTEC of a pole attachment agreement for the Bayshore Gardens area approximately three and one-half months later. GTEC initially requested an agreement for all the unincorporated portion of the county south of the City of Bradenton. Consistent with its past policies, respondent attempted to limit the geographic area requested by GTEC. By sometime in April, GTEC had narrowed its request to the Bayshore Gardens area, which surrounded the existing trunk line to the trailer parks. Since

respondent could see no reasonable grounds for denying an agreement for the limited area, an agreement was executed by GTEC on April 29, 1969. At that time, respondent's division manager believed that petitioner was out of business.

As mentioned above, in early 1969 petitioner's major creditor, SKL, attempted to arrange for a sale. In January, GTEC was contacted by SKL, but negotiations did not proceed after February because GTEC was advised that petitioner had been sold. On April 21, 1969, an attorney for petitioner again offered the company for sale to GTEC. The attorney advised GTEC that an entity known as McCullough Enterprises held an option which was to expire on April 30. However, petitioner's owners wanted a package sale of all their properties, while McCullough was interested only in purchasing petitioner.

In February 1969, Richard Leghorn, a Massachusetts CATV investor, had become aware that petitioner was for sale. On April 19, he traveled to Florida to investigate the company. A few days later, he started negotiations with the owners, and reached a handshake agreement at the end of the week of April 21. The formal agreement for a majority of the stock was signed on May 5, 1969. The only evidence as to when GTEC first became aware of the Leghorn purchase is a reference to a sale (without the identity of the purchaser) in a GTEC "April Business Report", which was prepared in the first or second week of May 1969. There is no evidence that respondent was ever aware of this report.

On May 22, 1969, the new owner of petitioner met with respondent to request a pole attachment agreement. On June 6, when petitioner sent respondent a letter formally

requesting an agreement, the Bayshore Gardens area was not requested, apparently because petitioner was already in Bayshore Gardens as an underground company. Instead, petitioner requested pole attachments in the area between its tower and Bayshore Gardens. In any event, while petitioner's new owner viewed Bayshore Gardens as a key area in terms of profit potential, there was no evidence that he viewed exclusion from Bayshore Gardens as tantamount to exclusion from the county as a whole.

Respondent initially denied the new owner's request for an attachment agreement because its contract with GTEC had been entered into at a time when petitioner appeared comatose. Since GTEC and petitioner were now seeking attachments for similar areas, respondent refused to enter a new agreement with either party. Moreover, respondent could see no reason to attempt to back out of the Bayshore Gardens agreement with GTEC, which had been entered into in good faith prior to the time that petitioner's new owner arrived. Respondent thus permitted GTEC to make attachments in Bayshore Gardens throughout June and July 1969.

Petitioner continued to seek an attachment agreement, and applied legal and political pressure to respondent throughout June and July. By the end of July, respondent acceded to petitioner's pressure, and executed a pole attachment agreement on July 28, 1969. The agreement was applicable to areas surrounding Bayshore Gardens (including virtually all the area requested in petitioner's June 6 letter), and permitted attachments to 1,281 poles, the same number of attachments made by GTEC in Bayshore Gardens.

Based on the foregoing events, petitioner proceeded to trial on the conspiracy issue.[3] The trial judge reserved ruling on respondent's motion for a directed verdict,[4] and submitted five special interrogatories to the jury. (A1-A2) The special interrogatories focused on whether respondent believed that a financially responsible person had purchased petitioner at the time of the Bayshore Gardens agreement with GTEC, and whether respondent entered into a conspiracy to exclude petitioner from competing in the cablevision business in Manatee County, Florida. The jury answered all interrogatories in favor of petitioner. (A1-A2) The trial court then granted respondent's motion for a judgment in accordance with its motion for a directed verdict, as to which ruling had been reserved. Alternatively, the trial court granted respondent's motion for a new trial on the ground that the verdict was against the manifest weight of the evidence. (A3)

On appeal, the Fifth Circuit Court of Appeals affirmed the judgment in favor of respondent, on the basis of the memorandum opinion of the district court. (A14)

REASONS FOR DENYING THE WRIT

I. The Granting of a Directed Verdict Did Not Deprive Petitioner of Its Right to a Jury Trial Guaranteed By the Seventh Amendment.

It is quite apparent that this case does not raise issues normally considered by this Court in certiorari petitions,

3. The trial judge bifurcated the case, and deferred trial on the issues of impact and damages.

4. The petition erroneously stated that the trial judge denied respondent's motion for a directed verdict. See the memorandum opinion of the district court, at A3.

such as an asserted conflict between decisions of the circuits or a consideration of an important and unsettled question of federal law. Instead, the instant petition involves review of a detailed series of events which petitioner contends establish circumstantial evidence of a conspiracy to violate Section 1 of the Sherman Act. While this case is of obvious importance to the immediate parties, it is further obvious that the decisions of the district court and Fifth Circuit are of no wide-ranging federal import.

This Court has repeatedly stated that it will not grant certiorari in order to review evidence adduced in the trial court or inferences drawn from it. See, *e.g.*, *General Talking Pictures Corporation v. Western Electric Company*, 304 U.S. 175, 82 L.ed. 1273 (1938); *U. S. A. v. Johnston*, 286 U.S. 226, 69 L.ed. 925 (1925). Recognizing this basic principle of Supreme Court practice, petitioner thus attempts to cloak the routine granting of a directed verdict with constitutional overtones, and asserts that the Fifth Circuit has denied its right to a jury trial.

Since the seminal case of *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 79 L.ed. 1636 (1935), it has been settled law that the granting of a directed verdict based on legal insufficiency of the evidence does not infringe on the right of trial by jury, as protected by the Seventh Amendment. Rule 50(b), *Federal Rules of Civil Procedure*, essentially adopts the ruling in *Redman*. See *Montgomery Ward & Company v. Duncan*, 311 U.S. 243, 85 L.ed. 147 (1940).

Respondent does not quarrel with petitioner's assertion of the importance of a jury as a fact-finding body, and that

in complex antitrust litigation summary procedures should be sparingly used.[5] However, it is manifest that summary procedures raising constitutional questions were not utilized in the instant case. Both the trial and circuit courts have considered at great length the evidence relating to petitioner's tortured conspiracy theory, and have unanimously concluded that there was a total failure of proof.[6]

The removal of a legally insufficient case from the jury is necessary to the vigorous functioning of the jury system, and preserves, rather than derogates, the traditional prerogatives of the trial jury. The Fourth Circuit considered constitutional contentions similar to those raised by petitioner in *Manaia v. Potomac Electric Power Company*, 268 F.2d 793 (4th Cir. 1959), *cert. denied* 361 U.S. 913, 4 L.ed.2d 183 (1959), and rejected them, as follows:

> "Finally, it is said that granting these judgments n. o. v. was a denial of the plaintiffs' rights under the Seventh Amendment. It is apparent from their brief,

5. The petition (at p. 5) refers to unusual appellate supervision of the setting aside of jury verdicts in cases arising under the Federal Employees' Liability Act, and quotes extensively from *Tennant v. Peoria & Pekin Union R. Co.*, 321 U.S. 29, 88 L.ed. 520 (1944), an FELA case. Unusual sensitivity to review of jury verdicts is necessary in these cases because of the "slight negligence" test for cases under the statute. *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 1 L.ed.2d 493 (1957). There is no such test under the Sherman Act.

6. Petitioner makes a rather gratuitous reference to the reversal by the Fifth Circuit of a jury verdict in favor of respondent in an utterly unrelated case, *Gainesville Utilities v. Florida Power & Light Co.*, 573 F.2d 292 (5th Cir. 1978), and asserts that the right to jury verdicts in antitrust cases in the Fifth Circuit is a "vanishing phenomenon". The *Gainesville Utilities* decision proves only that the Fifth Circuit is willing to find an antitrust conspiracy on the basis of slight evidence. Petitioner's suggestion that the Fifth Circuit rarely upholds jury verdicts in antitrust cases is, of course, absurd. See, *e.g.*, *Pinder v. Hudgins Fish Co., Inc.*, 570 F.2d 1209 (5th Cir. 1978). The Fifth Circuit's willingness to uphold a jury verdict in appropriate circumstances is typified by its decision in *Lehrman v. Gulf Oil Corporation*, 500 F.2d 659 (5th Cir. 1974).

> however, that the learned counsel for the plaintiffs have no deluding impression that this contention adds anything of substance to their position. They seem to recognize that no constitutional question arises when the court withdraws from the jury a case in which there is no issue of fact requiring the jury's determination. The power of the court to withdraw such cases from the jury is too firmly rooted in history and tradition for frontal attack. Nor do the parties here suggest that the power be allowed to atrophy, for its employment within its well defined boundaries is a protective restriction as necessary to the vigorous functioning of the jury system as preservation of the prerogatives of the jury. The contention does not question the established principles; it merely seeks an obscuring injection of the linguistics of constitutional principle into the familiar process of appraisal of evidence and its associated inferences." 268 F. 2d at 798, 799.

The *Manaia* opinion aptly summarizes the prevailing view of constitutional scholars and federal courts on the jury trial issue raised by petitioner. See *Moore's Federal Practice*, Vol. 5A, §50.07(1). Petitioner's attempt to inject constitutional issues into the instant case is without merit, and should be rejected.

II. The District Court and Fifth Circuit were Correct in Ruling That in the Light of the Evidence as a Whole, and Drawing All Reasonable Inferences Therefrom Most Favorable to Petitioner, There Was a Complete Lack of Probative Evidence to Support the Jury's Answers to the Special Interrogatories.

In upholding the granting of respondent's motion for a judgment *n.o.v.* on petitioner's theory of conspiracy, the

Fifth Circuit correctly applied its own principles governing directed verdicts, as set forth in *Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969). In the light of the evidence as a whole, and drawing all reasonable inferences therefrom most favorable to petitioner, there was a complete lack of probative evidence to support the jury's answer to the special interrogatories.

Admittedly, petitioner adduced no direct evidence of a conspiracy entered into by respondent to exclude it from the cablevision business in Manatee County. (A5) Rather than belabor petitioner's inferential conspiracy theory, in this brief respondent will simply refer to several examples of the failure of proof.

Initially, there was no evidence of any motivation on the part of respondent for entering into the alleged conspiracy. (A5) There was no evidence of any activities by respondent contrary to its usual economic interests, which might infer the existence of a conspiracy. (A9-A10) There was an absence of proof that on April 29, 1969, GTEC knew (or had reason to know) that a "financially responsible person" had purchased petitioner, or that GTEC imparted such knowledge to respondent.[7] (A8-A10)

While petitioner claimed it had been wrongfully excluded from doing business in Bayshore Gardens, in fact it had underground equipment in the area during the time of

7. Interrogatory One required proof that on April 29, 1969, GTEC believed that a financially responsible person had agreed to purchase petitioner. (A1) The only evidence of the possible existence of a purchaser on April 29, 1969, was a reference to an entity known as "McCullough Enterprises" in notes of a conversation between a GTEC executive and an attorney for the then owner of petitioner. There was no evidence whatever as to the financial condition of McCullough Enterprises.

the alleged exclusion. At the time of petitioner's first formal request for a pole attachment agreement (after purchase of the company by Leghorn), the Bayshore Gardens area was not even requested. Finally, there was no proof that exclusion from Bayshore Gardens was tantamount to exclusion from Manatee County as a whole. (A10)

The trial judge, who personally heard and considered all of petitioner's evidence at great length, aptly summarized the state of petitioner's proof:

> "In our judgment, plaintiff is simply grasping at straws after its long exhaustive search for probative facts has proved fruitless. There is an entire want of probative evidence to support plaintiff's claim." (A11)

Two courts have reviewed plaintiff's evidence at great length and have found it totally lacking in probative force. After six years of fruitless litigation, this case should finally be ended.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari to the Fifth Circuit Court of Appeals should be denied.

Respectfully submitted,

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